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Eleanor Swift

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DOES IT MATTER WHO IS IN CHARGE OF EVIDENCE LAW?

Eleanor Swift *

I. INTRODUCTION

In 1982 and again in 1990, initiative measures were placed on the ballot in California aimed at "reform of the criminal justice system as it relates to the actual and potential victims of crime."¹ Included in the package of proposed constitutional amendments and new legislation were significant changes in the character rule and the hearsay rule under California evidence law. Both initiatives passed.²

Although conclusive judicial interpretation of the initiatives' impact is yet to come, the goal of the drafters in changing the character and hearsay rules is clear: reducing restrictions on the government's tactical choice of proof to make convictions easier to obtain. But this effect on trial outcome is not the whole story. Changes in the character and hearsay rules will also change the moral claims of our criminal justice system and shift the balance of burdens between prosecution and defendant. And, given the success of the two initiatives, we can expect more proposals in this direction, both in California and elsewhere.

Thus, California's experiment with populist evidence law reform raises an important question for people who think that evidence law does matter: who ought to be in charge of it? The popular initiative challenges the bench, bar, legal academy and ultimately the legislature, as the institutional actors who have in the past served as the repositories of wisdom and authority over the process of proof at trial. It focuses our attention on the proper role of the public in making value judgments about this process. And, assuming the legitimacy of the public's role, it requires us to examine whether the initiative process is suited for making

* Professor of Law, University of California, Berkeley, School of Law; B.A., 1967, Radcliffe College; L.L.B., 1970, Yale Law School.

1. *Brosnahan v. Brown*, 32 Cal. 3d 236, 273, 651 P.2d 274, 296, 186 Cal. Rptr. 30, 52 (1982) (Bird, C.J., dissenting, quoting Respondents' Brief). CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION JUNE 8, 1982 AND JUNE 5, 1990.

2. Proposition 8 passed by a vote of 2,826,081 to 2,182,710 on June 8, 1982. Paul Gann, *Justice for the Accuser: Proposition 8—The Victims' Bill of Rights*, 4 BENCHMARK 69, 71 (1989). Proposition 115 passed by a vote of 2,540,352 to 1,923,513 on June 5, 1990. *State Propositions*, S.F. CHRON., June 7, 1990, at A11.

the kind of evidence policy changes that affect the moral and procedural foundations of our system of justice.

II. PROPOSITION 8: CHANGES IN THE RULES AGAINST USE OF CHARACTER EVIDENCE

Proposition 8, adopted in June of 1982, added section 28(d), denominated the "Right to Truth-in-Evidence," to article I of the California Constitution. It stated:

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, *relevant evidence shall not be excluded in any criminal proceeding*, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. *Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103.* Nothing in this section shall affect any existing statutory or constitutional right of the press.³

Although aimed primarily at the California exclusionary rule and the California Supreme Court's liberal interpretations of the United States Constitution's Fourth Amendment proscription of unreasonable searches and seizures,⁴ this constitutional provision appeared to abolish *all* specific restrictions on the use of *all* types of character evidence—reputation, opinion and specific acts—to prove propensity to commit the charged crime or to testify truthfully. Under California Evidence Code section 352, similar to Federal Rule of Evidence 403, the trial judge would still retain discretion to exclude character evidence after weighing its prejudice against its probative value. Sections 782 and 1103 of the California Evidence Code would also remain in force to protect victims of sex offenses against the indiscriminate use of their prior sexual history.⁵ At a minimum, commentators predicted a radical transformation in the use of character evidence in criminal trials.⁶

3. CAL. CONST. art. I, § 28(d) (emphasis added).

4. Section 28(d) did not repeal California Penal Code § 1538.5, the California exclusionary rule, but did abolish any interpretation of it more strict than the federal constitutional counterpart. See generally Mark D. Klein & Randall A. Cohen, *Proposition 8: California Law After In re Lance W. and People v. Castro*, 12 PEPP. L. REV. 1059 (1985) (analyzing cases dealing with Proposition 8 and recognizing public's desire to decrease level of constitutional protection to criminal defendants).

5. CAL. EVID. CODE §§ 352, 782, 1103 (West 1966 & Supp. 1992).

6. For a detailed analysis of the predicted effect of Proposition 8 on all aspects of character evidence in California, see Miguel A. Mendez, *California's New Law on Character Evi-*

Proposition 8 also added section 28(f) to article I of the California Constitution, specifically addressing the use of prior convictions for impeachment purposes in criminal trials:

*Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.*⁷

This provision was intended to abolish a line of California Supreme Court cases delineating the bounds of permissible impeachment by requiring the trial court to consider: (1) the prior felony's relation to honesty and integrity; (2) its remoteness in time; (3) its similarity to the crime charged; and (4) the effect of its admission on the defendant's decision to testify.⁸

III. PROPOSITION 115: PERMITTING THE USE OF HEARSAY IN PRELIMINARY HEARINGS

The voters of California again rewrote a part of evidence law in June of 1990. Proposition 115 worked fundamental changes in the proof process at preliminary hearings, where the vast majority of felony complaints in California are initiated upon a finding of "sufficient cause to believe that the defendant is guilty."⁹

First, Proposition 115 specifically approved the admission of hearsay at preliminary hearings by adding section 30(b) to article I of the constitution.¹⁰ Second, it implemented this new constitutional section

dence: Evidence Code Section 352 and the Impact of Recent Psychological Studies, 31 UCLA L. REV. 1003 (1984). Other areas of evidence law that could be affected by § 28(d) are lay and expert opinion testimony, the use of scientific evidence and the use of psychiatric evidence concerning credibility. *Id.* at 1031-37. Chief Justice Bird also predicted effects on the law of competency, personal knowledge and admissibility of religious beliefs. *Brosnahan v. Brown*, 32 Cal. 3d 236, 278-79, 651 P.2d 274, 300, 186 Cal. Rptr. 30, 56 (1982).

7. CAL. CONST. art. I, § 28(f) (emphasis added).

8. *See, e.g., People v. Castro*, 38 Cal. 3d 301, 307-09, 696 P.2d 111, 114-15, 211 Cal. Rptr. 719, 721-23 (1985).

9. CAL. PENAL CODE § 872(a) (West 1985 & Supp. 1992).

10. The new § 30(b) reads as follows: "In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process." CAL. CONST. art. I, § 30(b). Under previous California Supreme Court precedent, the use of hearsay at preliminary hearings had been found to violate due process under the state constitution when the defendant was required to make "reasonable efforts" to secure the presence of the declarant as a condition precedent to objecting. *Mills v. Superior Court*, 42 Cal. 3d 951, 958, 728 P.2d 211, 214, 232 Cal. Rptr. 141, 144 (1986).

30(b) by creating a statutory "law officer" exception to the hearsay rule in section 872(b) of the California Penal Code.¹¹ Under this "law officer" exception, Proposition 115 authorized holding criminal defendants to answer on felony charges based upon hearsay statements made to police officers. For instance, out-of-court statements of eyewitnesses or victims concerning such critical facts as the identity of the perpetrator could be substituted for the declarant's live testimony.

Moreover, Proposition 115 further insulated these hearsay statements by prohibiting the defendant from calling and cross-examining any hearsay declarants whose out-of-court statements were admitted under this "law officer" exception.¹² And further, Penal Code sections 866(a) and (b) were amended to condition the right of the defendant to call any witnesses at all. Upon the request of the prosecuting attorney, the judge shall not allow any defense witness to testify unless the defense makes an "offer of proof" that satisfies the judge that the testimony would be "reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness."¹³

IV. THE SIGNIFICANCE OF THESE CHANGES IN CALIFORNIA EVIDENCE LAW

The character rule and the hearsay rule are not insignificant targets. Other than the overarching requirement of relevance, they are perhaps the two most basic principles of exclusion in Anglo-American evidence law. Both bodies of law involve primary rules of exclusion and exceptions (and some counter exceptions) that have developed during the past several hundred years.

A description of the overall significance of these rules for our system of proof is beyond the scope of this Essay. Recent scholarship empha-

11. Notwithstanding Evidence Code § 1200 (the hearsay rule), "the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted." CAL. PENAL CODE § 872(b) (West Supp. 1992). Any law enforcement officer testifying as to hearsay statements must either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training, which includes training in the investigation and reporting of cases and testifying at preliminary hearings. *Id.*

12. Section 1203.1 added to the Evidence Code reads as follows: "Section 1203 [providing that a declarant may be called and examined as if on cross-examination by the adverse party] is not applicable if the hearsay statement is offered at a preliminary examination, as provided in Section 872 of the Penal Code." CAL. EVID. CODE § 1203.1 (West Supp. 1992).

13. CAL. PENAL CODE § 866(a) (West Supp. 1992).

sizes that these rules derive from many sources of values¹⁴ and serve many functions at trial.¹⁵ In practical terms, both rules limit the government's tactical choice of proof in criminal trials. For the question raised here—whether decisions to amend these rules should be made by direct popular vote—two defining effects of these limits will be considered: they make a moral claim for our system of criminal justice and they set the respective balance of burdens between the prosecutor and the defendant. A brief discussion of these effects suggests the significance of the changes worked by Propositions 8 and 115. The adequacy of the initiative process for making these changes will then be analyzed.

A. Propositions 8 and 115 Change the Moral Claims of the Character and Hearsay Rules

The character rule removes a key substantive option from the government's case. Reasoning directly from the defendant's "bad" character to prove conduct on a particular occasion, typically commission of the crime charged, is forbidden. The premise of the character rule is that although general character traits may be relevant to prove specific acts, to permit this reasoning injects excessive risk of prejudice, including offensive class and race stereotypes, into the proof process. Protecting against this risk thus buttresses the essential moral foundation of our act-based system of criminal justice. Individuals are to be held accountable for what they do, not for who or what they are.¹⁶ In relating to the individual, the government is not to treat people adversely on the basis of their personhood. Some commentators link this act-oriented, prejudice-avoiding premise of the character rule to the right to equal protection of

14. For a discussion of the values served by the character rule, see David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 15-31 (1986-87); Mendez, *supra* note 6, at 1006-09. For a discussion of the values served by the hearsay rule, see Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057 (1986).

15. For a description of the function of the character rule, see Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 580-82 (1990); Leonard, *supra* note 14, at 15-25. For a description of the function of the hearsay rule, see Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 518-19 (1987).

16. See Mendez, *supra* note 6, at 1007 (person may not be punished for bad reputation, unpopular thoughts or past actions).

the laws;¹⁷ others to fundamental fairness and due process.¹⁸ While the rule has important qualifications in its application, to abandon it wholesale is to abandon these values altogether.

The hearsay rule limits the government's use of secondhand sources of knowledge to prove its case against the defendant. A person with knowledge of disputed facts, whether victim or eyewitness, must appear as a live witness at trial unless the person's out-of-court statement fits within a categorical hearsay exception. A special limit on the government's use of hearsay is set by the federal Constitution through the Confrontation Clause, which has been interpreted to require, at least in some instances, a showing that the hearsay declarant is not available to be a live witness.¹⁹

Preference for live testimony sets a moral limit on our process of trial. The presence of a live witness, who meets the accused face to face, requires the exercise of that individual's conscience for the government to obtain a judgment of guilt. Interposing the personal moral responsibility of witnesses as accusers between the individual defendant and the state is fundamental to the fairness of criminal trials.²⁰ It restrains the government against using faceless accusers as a convenient tactical strategy and prevents the development of government systems of harassment through the criminal process in contrast, for example, with the type of "smear campaign" that characterized the era of McCarthyism.

Removing some or all of the restrictions imposed by the character and hearsay rules will inevitably lead to the government's increased use of both types of proof. The process may be gradual, slowed perhaps by

17. "One of the central tenets of our litigation system is that a person's general character may not serve as a basis for a denial of civil rights or imprisonment; all citizens are entitled to the equal protection of the laws. The character rules implement this trial administration policy." RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES 450 (1991).

18. This is how Professor Mendez reads *Michelson v. United States*, 335 U.S. 469 (1948). See Mendez, *supra* note 6, at 1013-15.

19. But see *White v. Illinois*, 112 S. Ct. 736 (1992), which recently confined the unavailability requirement of *Ohio v. Roberts*, 448 U.S. 56 (1980), to its own facts (hearsay statements made during prior judicial proceeding). *White*, 112 S. Ct. at 737. The Court in *White* held that unavailability was *not* a requirement of the Confrontation Clause for spontaneous statements and statements made "in the course of procuring medical services." *Id.* at 742-43. Under its reasoning, these two types of out-of-court statements have sufficient guarantees of reliability and cannot be duplicated by the declarant later testifying in court. It is not yet clear whether *all* hearsay admitted under an established exception is similarly free of the requirement of unavailability, although the Court implies this. *Id.* Thus, for hearsay not within an exception, and perhaps for other types of admissible hearsay yet to be determined, the preference for live testimony still holds.

20. See generally Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. (forthcoming 1992) (asserting ethical basis for Confrontation Clause). But see *Coy v. Iowa*, 487 U.S. 1012, 1017-19 (1988).

the reluctance of prosecutors and judges to abandon the morality of the system they have practiced since law school. Indeed, nine years after the passage of Proposition 8, the question whether it has definitely abolished the character rule has not yet been decided by the California Supreme Court.²¹ However, changes in the rules eventually change the attitudes of judges, and the attitudes of judges change the attitudes of lawyers.²² When this occurs, increased use of character and hearsay evidence by the prosecutor will reduce the degree to which the concept of individual responsibility for conduct can provide the moral basis for conviction and punishment. In the meantime, and at a minimum, the state reduces its official stance in favor of these foundational moral values.

B. Propositions 8 and 115 Change the Burdens Imposed by the Character and Hearsay Rules

Removing the restrictions imposed by the character and hearsay rules will increase the burdens on criminal defendants. This change will affect the fairness of criminal trials, in addition to its obvious effect on outcomes—shorter preliminary hearings and more convictions. The heavy burden on the government—proof beyond a reasonable doubt—is an established due process right. Changes in the law that shift any of this burden to the defendant should be understood as affecting the fundamental fairness of criminal trials.²³

Both the character and hearsay rules limit the government's ability to choose its proof solely to serve its own narrow self-interest; that is, to win its case efficiently. Thus, the rules have *increased* the government's burden of litigating *relative* to the defendant. The government has had to find strategies other than proving the defendant's bad character, which might often be a winning tactic; and the government has had to present many of its primary sources of knowledge live, subject to the defendant's

21. The California Supreme Court reserved this question in *People v. Harris*, 47 Cal. 3d 1047, 1080-82, 767 P.2d 619, 641, 255 Cal. Rptr. 352, 373-74 (1989) (holding that addition of § 28(d) to article I of the California Constitution abolished all exclusionary rules relating to witness credibility). Two arguments against a finding of abolition have been made. The first is that by preserving Evidence Code § 1103 explicitly, § 28(d) preserved § 1101 (the basic character rule of exclusion) by implication. *People v. Perkins*, 159 Cal. App. 3d 646, 650, 205 Cal. Rptr. 625, 627 (1984). The second is that an amendment to the Evidence Code in 1986, passed by more than a two-thirds vote of each house in the state legislature, effected a reenactment of § 1101. *People v. Scott*, 194 Cal. App. 3d 550, 553, 239 Cal. Rptr. 588, 591-92 (1987).

22. See, e.g., RICHARD O. LEMPET & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 524 (2d ed. 1982).

23. See, e.g., *Mills v. Superior Court*, 42 Cal. 3d 951, 959, 728 P.2d 211, 215-16, 232 Cal. Rptr. 141, 145 (1986) (holding that improperly easing prosecutor's task of establishing probable cause at preliminary hearings violates defendant's due process rights).

immediate cross-examination, rather than as hearsay declarants insulated from such confrontation.

Abolition of the character rule under Proposition 8 increases the burden of defense in at least three obvious ways. First, the government is free to raise the issue of the defendant's bad character in its case-in-chief, through any relevant means, whenever it believes it to be tactically expedient to do so. Presentation of evidence as to character then permits character to be argued to the jury. The risk to the defendant of ignoring this line of attack, and the burden of trying to rebut it, are very high.

Second, if the government is free to use evidence of specific "bad acts" committed by the defendant (now that character can be proved), the defendant's burden of rebuttal is especially difficult. Either the defendant submits counterproof to show that he or she did not commit the bad acts, risking confusion and tedium for the jury, or the defendant is pressed to take the stand either to explain away the prior acts or to attempt to prove rehabilitation. If the defendant cannot do either or is a poor witness, the government's attack on character goes unanswered.

Finally, if the defendant does take the stand, the defendant's credibility is at issue and Proposition 8 makes *all* relevant evidence as to untruthfulness admissible for impeachment purposes, including specific acts of untruthfulness as well as prior felonies. Thus, the choice to testify is now far more risky than under prior law.

The lenient "law officer" exception to the hearsay rule established by Proposition 115 also increases the criminal defendant's burden. First, and most obviously, the government's use of police officers to testify at preliminary hearings about inculpatory hearsay statements made to them shields the hearsay declarant and precludes the defendant from obtaining important information to prepare for trial. The defendant cannot observe the declarant testifying, and cannot evaluate the declarant's credibility and effectiveness as a potential trial witness. The defendant cannot cross-examine the declarant to learn more about his or her story, or to obtain facts necessary to impeach the declarant's statement at trial.

While some facts *about* the declarant may be gleaned from cross-examining the police officer,²⁴ Proposition 115 insulates the declarant himself by adding section 1203.1 to the Evidence Code. Under this sec-

24. The California Supreme Court has recently upheld the constitutional validity of using "law officer" hearsay at preliminary hearings. *Whitman v. Superior Court*, 54 Cal. 3d 1063, 820 P.2d 262, 2 Cal. Rptr. 2d 160 (1991). The court's opinion in *Whitman* limits the exception to testimony from police officers who have been involved in the investigation of the alleged crime, and who have "sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made." *Id.* at 1075, 820 P.2d at 267, 2 Cal. Rptr. 2d at 166-67.

tion, the defendant may not call the declarants in "law officer" hearsay as adverse witnesses at the preliminary hearing in order to cross-examine them. The inability to question key prosecution witnesses at the preliminary hearing increases the defendant's burden of preparing for trial. Other sources of knowledge about the witnesses must be obtained; cross-examination must be attempted cold. It is even possible that the government may not ever have to present key adverse witnesses at trial if it can introduce their hearsay statements. This may be possible because of *White v. Illinois*,²⁵ which recently held that a child victim's hearsay—at least excited utterances and statements to a treating physician—are admissible under the United States Constitution's Confrontation Clause without any showing of the child declarant's unavailability. After *White*, a defendant in California can be charged on the basis of a victim's hearsay statement made to a law officer (admitted at the preliminary hearing), and convicted on the basis of hearsay—excited utterances or medical statements—made to others by the same victim (admitted at trial). The government would never have to produce the victim as a witness in its case.²⁶ The burden, which has thus shifted onto the defendant to investigate, prepare and present information to discredit the declarant, or to risk calling the declarant as a witness at trial, is heavy indeed.²⁷

V. HOW DID THE CHARACTER RULE AND THE HEARSAY RULE GET SUBMITTED TO A POPULAR VOTE AND PASSED BY THE ELECTORATE?

California has always been an important locus of what has come to be known as the victims' rights movement.²⁸ A political platform in

25. 112 S. Ct. 736 (1992).

26. This is not an improbable scenario, as the facts in *White* demonstrate. The child victim in *White* made several hearsay statements: to her baby sitter, mother, a police officer and finally to medical personnel. *Id.*

27. See Swift, *supra* note 15, at 514-16. Pretrial depositions are available only upon a showing that a material witness is about to leave the state, is ill or infirm, or is in jeopardy. CAL. PENAL CODE §§ 1336-1337 (West Supp. 1992).

28. California passed the first statute providing for state compensation for innocent victims of violent crime in 1965. Act of September 17, 1965, ch. 1549, 1965 CAL. STAT. 3641-42, repealed by Act of November 8, 1967, ch. 1546, § 2, 1967 CAL. STAT. 3707, 3709. The National Organization for Victim Assistance (NOVA), an umbrella group coordinating victim advocacy efforts, was founded in Fresno in 1976. For a discussion of these and other early events in the movement, see Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1 (1984); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985). This issue of the Pepperdine Law Review is, in fact, a symposium of articles on victims' rights which were commissioned by the United States Department of Justice's National Institute of Justice. See Letters of Introduction, 11 PEPP. L. REV. at xiii (1984).

favor of increasing the visibility of crime victims, establishing funds for their compensation, protecting them from callous treatment and giving them a right to be heard in the criminal justice process, has attracted large numbers of voters over the past ten years. Fueled perhaps by the "rights consciousness" of the 1960s and 1970s, by "[t]he tidal wave of crime"²⁹ in America during that same time and by "the decline of support for liberal approaches" to crime,³⁰ a victim's rights platform was adopted by President Reagan's Task Force on Victims of Crime in 1982, and implemented by Congress's passage of the Victim and Witness Protection Act of 1982³¹ and the Victims of Crime Act of 1984.³² It has been primarily in California, however, that an attack on the procedural rights of criminal defendants has been incorporated into the victims' rights political agenda.

Both Proposition 8 (known as the Victims' Bill of Rights) and Proposition 115 (known as the Crime Victim's Justice Reform Initiative) presented the voters with a list of constitutional and statutory amendments packaged as protections for the rights of crime victims. Proposition 8 did include aspects of the more traditional platform. It amended the California Constitution, Penal Code and Welfare and Institutions Code to provide for victims' right of restitution and right to participate in sentencing and parole hearings.³³ However, the bulk of the Proposition targeted defendants' rights. It made granting bail a matter of discretion rather than a matter of right, provided for mandatory enhancement of sentences for prior felonies, restricted the use of evidence to prove diminished capacity, restricted plea bargaining for specified felonies and for offenses of driving while intoxicated and protected eighteen-year-olds from being sentenced to Youth Authority upon the commission of specified crimes.³⁴ *Newsweek* magazine called Proposition 8 a "counter-Con-

29. Carrington & Nicholson, *supra* note 28, at 4.

30. Henderson, *supra* note 28, at 945.

31. Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at FED. R. CIV. P. 32 and in scattered sections of 18 U.S.C.). 18 U.S.C. §§ 1512-1515, 3663-3664 (1988) provides for victim impact statements at sentencing, protection from intimidation, restitution from offenders, guidelines for fair treatment in federal criminal cases, and general tightening of bail laws.

32. Pub. L. No. 98-473, §§ 1401-1410, 98 Stat. 2170, 2170-78 (codified as amended at 42 U.S.C. §§ 10601-10604 and in scattered sections of 18 U.S.C.). 42 U.S.C. § 10601 (1988) establishes victim compensation fund from fines assessed in federal convictions.

33. See CAL. CONST. art. I, § 28(b) (right to restitution); CAL. PENAL CODE §§ 1191.1, 3043 (West 1983 & Supp. 1992) (right to participate in sentencing); CAL. WELF. & INST. CODE § 1767 (West 1984) (right to participate in parole hearings).

34. See CAL. CONST. art. I, § 28(e) (bail); CAL. PENAL CODE § 667 (West 1988 & Supp. 1992) (enhancement of sentence); *id.* § 25 (West 1988) (diminished capacity); *id.* § 1192.7 (West 1982 & Supp. 1992) (plea bargaining); CAL. WELF. & INST. CODE § 1732.5 (West 1984) (18-year-old and older offenders).

stitution.”³⁵ The changes in evidence law were thus only part of this larger anti-crime and victims’ rights package.

Proposition 115 was, if anything, even broader in scope. It required that, in criminal cases, rights under the California Constitution “shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States.”³⁶ It also, *inter alia*, abolished the right of the parties to examine prospective jurors in criminal cases, expanded the definition of first degree murder, required reciprocal pretrial discovery between the prosecution and defense, created the new crime of torture, added new “special circumstance” killings to the Penal Code, required felony trials to be set within sixty days of arraignment, required assignment of felony cases only to defense attorneys who would be ready to proceed within specified time limits and restricted the courts’ ability to prohibit joinder of criminal cases on a number of grounds.³⁷ The proposals to streamline the pretrial process, and to prevent victims from having to testify at preliminary hearings, were identified as protecting victims’ rights. Again, the evidence law changes pertaining to preliminary hearings were only a part of the package.

Among the originators of Proposition 8 were a bipartisan group of state legislators and George Nicholson, Executive Director of the California District Attorneys Association.³⁸ Their efforts were joined by the Committee to Stop Crime, led by Paul Gann (architect of the “taxpayers’ revolt” known as Proposition 13). Then-Attorney General George Deukmejian, as Republican candidate for California governor, campaigned for the Proposition, strongly endorsed it in the voters’ pamphlet mailed to all voters, and subsequently won the election.

The initial drafters and organizers of the campaign for the measures underlying Proposition 115 also included prosecutors from Orange, Kern and Los Angeles counties. Although their organizing efforts were aided

35. Aric Press & Joe Contreras, *A Victim's Bill of Rights*, NEWSWEEK, June 14, 1982, at 64.

36. CAL. CONST. art. I, § 24. This provision was denied effect by the California Supreme Court in *Raven v. Deukmejian*, 52 Cal. 3d 336, 355, 801 P.2d 1077, 1089, 276 Cal. Rptr. 326, 338 (1990), on the ground that it amounted to an impermissible revision, not amendment, of the California Constitution.

37. See CAL. CONST. art. I, § 30(c); CAL. CIV. PROC. CODE § 223 (West Supp. 1992) (examination of jurors); CAL. PENAL CODE § 189 (West Supp. 1989) (first degree murder); *id.* § 1054-1054.7 (West Supp. 1992) (reciprocal discovery); *id.* § 206 (West Supp. 1992) (torture); *id.* § 190.5(b) (West Supp. 1992) (special circumstances); *id.* § 1049.5 (West Supp. 1992) (setting trial); *id.* § 987.05 (West Supp. 1992) (assignment of defense counsel); *id.* §§ 954.1, 1050.1 (West Supp. 1992) (joinder).

38. Gann, *supra* note 2, at 69-70.

by prosecutors statewide, they did not secure enough signatures to qualify for the ballot.³⁹ However, the political value of a tough anti-crime initiative became apparent in 1989. Then-Senator Pete Wilson, the Republican candidate for governor, threw his support behind the measure.⁴⁰ Former San Francisco Mayor Dianne Feinstein, running for Governor as a Democrat, also backed the initiative while another Democratic candidate in the primary, John Van de Kamp, opposed it. Wilson's campaign was successful.

VI. WHO SHOULD BE IN CHARGE OF EVIDENCE LAW? THE
DIRECT POPULAR INITIATIVE IS NOT SUITED FOR MAKING
CHANGES THAT AFFECT THE MORAL CLAIMS OF
EVIDENCE LAW AND THE BALANCE OF
BURDENS IT IMPOSES

Traditionally, adjudication and legislation have been the legal mechanisms by which value conflicts related to the proof process in criminal (and civil) trials have been resolved. Evidence law, first judge-made and then codified, is the result. The supporters of Propositions 8 and 115 claimed that their initiatives brought the absent voices, interests and values of actual and potential victims into the lawmaking process.

In a democracy, there is tension between acknowledging the legitimacy of the public's value judgments in policy and lawmaking and recognizing that those value judgments should be based on a decision-making process involving information, competence and experience that are usually the province of elites. Thus, the adequacy of the initiative *process*, and its differences from adjudication and legislation, can be evaluated wholly apart from disagreements about substance. The initiative process for Propositions 8 and 115 was not well-suited for making considered decisions about the moral basis of the character and hearsay rules, or about the balance of burdens they establish.

39. See generally Jerry Hicks, *Court Reform Measure Raises Controversy*, L.A. TIMES (Orange County ed.), May 28, 1990, at B1 (describing early organization of Proposition 115 by prosecutors, crime victims and politicians).

40. "Early campaign contributions of some \$800,000—essentially Wilson campaign money rerouted, the Los Angeles Times said in an anti-Proposition 115 editorial—let the prosecutors hire professional signature gatherers who got the measure on the ballot." Gail Diane Cox, *California Passes Justice Reform Act*, NAT'L L.J., June 18, 1990, at 3, 38.

A. Supporters of the Propositions Claimed that Constitutional and Legislative Change Was Necessary Because Victims' Rights Had Been Undervalued in the Criminal Justice System

Supporters of both Propositions claimed that using popular initiatives to reform the criminal justice system was legitimate because the judicial and legislative processes had for too long not taken adequate account of victims' interests. They appealed to two different platforms under the rubric of victims' rights. First, they sought legal recognition that there exists a private, bipolar dispute between crime victims and perpetrators. As described above, the proposals for victim participation in sentencing and parole hearings, for restitution, and for nonparticipation in preliminary hearings were directed at this vision of a "private" dispute underlying the public dispute between the prosecution and the defendant. Victims were acknowledged as *actual participants* in a legal process triggered by events that happened *to them*, much as tort victims have rights against tortfeasors.

However, most of the constitutional and statutory changes in both Propositions 8 and 115 did not vindicate these private interests, but reflected the second platform backed by the supporters—an attack on defendants' procedural rights in the criminal justice system.⁴¹ By reducing the procedural rights of criminal defendants, criminals "will be appropriately detained in custody, tried by the courts, and sufficiently punished,"⁴² which will keep "society as a whole . . . free from the fear of crime in our homes, neighborhoods, and schools."⁴³ The supporters used the image of future victimization to appeal to the interests of the general public in stopping crime, particularly violent crime directed against individuals.⁴⁴ The judiciary in particular was criticized for going too far in protecting the rights of persons accused of crimes, and for undervaluing interests of the law-abiding public in securing convictions and adequate punishment. The state legislature, according to the supporters,

41. Professor Henderson also differentiates this second platform from the first: "[G]enuine questions about victims and victimization have become increasingly coopted by the concerns of advocates of the 'crime control' model of criminal justice." Henderson, *supra* note 28, at 951. Victims, she notes, have no more "right" to say how the government shall enforce the criminal law than any other segment of the population. *Id.* at 986.

42. CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION JUNE 8, 1982, at 33, *reprinted in* 1 STATUTES OF CALIFORNIA AND DIGESTS OF MEASURES at A-186 (1982); *see* CAL. CONST. art. I, § 28.

43. CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION JUNE 5, 1990, at 33.

44. Some of this argumentation has been labelled "cynical manipulation of victim's rights" when the procedural right attacked—for example the Fourth Amendment exclusionary rule—has no demonstrable effect on controlling crime. Henderson, *supra* note 28, at 982-86.

had been unresponsive to numerous measures proposed to correct the balance of these public values prior to Proposition 8.⁴⁵ Thus, having exhausted their legislative remedies, the supporters sought another avenue, the direct popular initiative, to change the constitution and the laws governing the criminal trial process.

It does not appear that a concerted but unsuccessful effort was made to sponsor legislation similar to Proposition 115.⁴⁶ Thus, Propositions 8 and 115 may reflect differing applications of the principle that exhaustion of political remedies justifies recourse to the direct popular initiative. But even were the exhaustion argument wholly valid, it does not follow that any and every resort to an initiative is thereby legitimized. Legitimacy should derive from the ability of voters to vote meaningfully and knowledgeably on the issues presented.

B. The Direct Initiative Is Not Generally Used to Enact Changes in Evidence Law

The initiative power in California is provided for in the California Constitution. Under article IV, section 1 of the California Constitution, "the people reserve to themselves the powers of initiative and referendum,"⁴⁷ a right viewed as "'one of the most precious rights of our democratic process.'"⁴⁸ The legislature plays no role in drafting or commenting upon proposals that are placed on the ballot through petition. Judicial review of the passage and adoption of these measures, as opposed to the validity of their operation in concrete cases, is usually

45. Paul Gann charged that "efforts to modify California Supreme Court decisions in the State legislature were personally thwarted by Assembly Speaker Leo McCarthy and a small but potent committee, the Assembly Criminal Justice Committee, which he structured and controlled by maintaining a majority of liberal ideologues as members." Gann, *supra* note 2, at 69. It is correct that from 1977 to 1982 legislation to restrict the rights of defendants was proposed by future Proposition 8 supporters but failed in the Assembly, including measures to enhance criminal sentences, Cal. A.B. 387, 1977-78 Reg. Sess. (1977), restrict bail, provide for reciprocal discovery, limit the California Constitution's protections to those afforded by the federal one, Cal. Ass. Const. Amend. No. 77, 1977-78 Reg. Sess. (1978), and expand the use of character evidence by the prosecution, Cal. A.B. 1286, 1981-82 Reg. Sess. (1981). However, measures to provide rights of restitution, notification and participation to crime victims received bipartisan support from 1977 to 1982, including that of Speaker McCarthy. *See, e.g.*, Cal. A.B. 3015, 1979-80 Reg. Sess. 1980.

46. Only one such effort to "push a court reform package through the Legislature" is mentioned in the news coverage. *See Hicks, supra* note 39, at B12.

47. CAL. CONST. art. IV, § 1.

48. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 248, 583 P.2d 1281, 1302, 149 Cal. Rptr. 239, 259 (1978) (quoting *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976)).

limited to the requirement that they embrace but one "subject,"⁴⁹ that the text disclose "the full purpose and effect of [the] provisions"⁵⁰ and that they amend but not revise the California Constitution.⁵¹

Popular initiative power exists throughout the United States, but it has not been generally used to enact or reform the law of evidence. Twenty-two states, including California, permit either the proposal of legislation, or amendment or revision of the state constitution through ballot initiatives.⁵² Only in scattered instances has the initiative power been used to address problems of criminal justice, such as applying the death penalty to certain felonies or permitting indictments by grand jury.⁵³

Arizona, Michigan and Florida have passed victims' rights initiatives that amend their state constitutions. All three of these initiatives reflect the traditional platform of the victims' rights movement—the rights to be informed, to be present and to be heard at relevant stages of the criminal prosecution—but do not contain any specific changes in evidence law.⁵⁴

49. CAL. CONST. art. II, § 8(d).

50. See *Brosnahan v. Brown*, 32 Cal. 3d 236, 282, 651 P.2d 274, 302, 186 Cal. Rptr. 30, 59 (1982) (Bird, C.J., dissenting).

51. The legislature may propose amendment or revision of the constitution, while an initiative may only amend. *Id.* at 289, 651 P.2d at 307, 186 Cal. Rptr. at 63 (Bird, C.J., dissenting).

52. See LAURA TALLIAN, *DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM, AND RECALL PROCESS* 45 (1977); see also Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1477 n.24 (1987) (discussing necessity of state constitutional change and constitutional processes for accomplishing change).

53. In 1977 the Congressional Research Service published a report that compiled all state initiatives that had reached the ballot between 1898 and 1977. THOMAS DURBIN, *INITIATIVE REFERENDUM AND RECALL: A RESUME OF STATE PROVISIONS*, reprinted in *Proposed Voter Initiative Constitutional Amendment: Hearings on S.J. Res. 67 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 280 (updated by Rita Ann Reimer, 1977). A survey of scattered information on the initiative measures passed since 1977 shows that more frequently initiative activities have addressed abortion, land use, casino gambling, financial disclosure, campaign spending, school busing, taxation, educational spending, nuclear disarmament, legislative apportionment and English as the official language. In the investigation of initiative subjects for this paper, we found no other initiatives that enacted new evidence law.

54. The Florida amendment provided for these rights "to the extent that these rights do not interfere with the constitutional rights of the accused." FLA. CONST. art. I, § 16(b). The Michigan amendment added the "right to be treated with fairness and respect for their dignity and privacy," the "right to timely disposition of the case following arrest of the accused," and the "right to restitution." MICH. CONST. art. I, § 24(1).

The Arizona amendment did mention the law of evidence. It encompassed all of the rights in the traditional platform and in the Florida and Michigan Constitutions. It added the victim's right to "refuse an interview, deposition, or other discovery request by the defendant"

But with the success of Propositions 8 and 115 in California, the use of initiatives to change evidence law may be spreading. In 1990 an amendment to the Oregon Constitution was proposed by initiative under the ballot title "New Constitutional Provision Gives Crime Victims Rights, Expands Admissible Evidence."⁵⁵ The initiative was removed from the ballot prior to being voted upon, but petitions to place a similar measure on the ballot in 1992 are currently circulating. The Oregon measure proposes to grant to crime victims the "right to have all relevant evidence admissible against the criminal defendant," preserving *only* the limits set by statutory hearsay and privilege rules.⁵⁶ Thus, the changes in evidence law proposed for the Oregon Constitution could go beyond those adopted under Propositions 8 and 115 in California.

C. The Initiative Process Does Not Provide Considered Attention to Evidence Law Changes

It is highly likely that California voters did not base their decision to vote for or against Proposition 8 or Proposition 115 upon the changes worked to the character and hearsay rules. Both propositions presented multiple constitutional and statutory provisions related to the processing of criminal cases, many of which were more visible to voters. In both campaigns, a particular provision was emphasized by supporters or critics, or otherwise captured the attention of the media. For Proposition 8, repeal of the California exclusionary rule, limitations on plea bargaining and the right to "safe schools" received the most attention.⁵⁷ For Proposition 115, the costs of the measure and the effect on abortion rights were most heavily publicized.⁵⁸

In the pamphlet sent to voters prior to the Proposition 8 election, the possible changes to the character rule were not even mentioned in the analysis provided by the legislative analyst. The pamphlet arguments focused on the virtues of cracking down on criminal offenders versus the

and the victim's right to "have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights." ARIZ. CONST. art. II, § 2.1(A), cls. 5, 11 (emphasis added).

55. Proposed OR. CONST. art. I, § 41.

56. *Id.* at § 41(1)(b), (3); see also *Shepard v. Roberts*, 802 P.2d 654, 654-55 n.1 (Or. 1990) (setting forth full text of initiative proposal).

57. See, e.g., *California's Backfire on Crime*, N.Y. TIMES, June 21, 1982, at 18; Robert Lindsey, *California Voting on Criminal Laws*, N.Y. TIMES, May 23, 1982, § 1, at 11.

58. "The furor over the abortion issue, unfortunately, has diverted public attention from the remaining 99 percent of the initiative, which proposes major changes in California's criminal justice system." William Carlsen, *Abortion Issue is Complicating Prop 115's Chance of Passing*, S.F. CHRON., May 28, 1990, at A6.

vices of "mangling" constitutional rights.⁵⁹ The analysis of Proposition 115 mentioned only generally that hearsay evidence would be allowed at preliminary hearings without spelling out the consequences, while the pamphlet arguments largely debated the effects on privacy and abortion rights in California. Thus it seems unrealistic to claim that the specific evidence law changes were considered, let alone considered *carefully*, by the voters.⁶⁰

In contrast, when evidence law is developed through adjudication, the adversary system usually insures that careful, considered attention is paid to important changes in the law. Such changes are formulated by judges on the basis of competing doctrinal solutions to problems of proof presented by adversaries. The judge's decision is case-specific. The judge focuses on the likely concrete effects of the evidence change he or she is being asked to make. The adversaries present specific arguments about benefits and costs to the particular parties, and they may also present generalized arguments as to the possible broad or long-term effects on other cases to illuminate the policy choices that are at stake.

The legislative process, too, directs considered attention to conflicts in interests and values when evidence codes are enacted and changed. Proposals are addressed by a wide variety of participants, including both legislators and interest groups. The Federal Rules, for example, were drafted by an advisory committee made up of prominent judges, lawyers and academicians. Drafts were circulated to larger professional groups throughout the country, leading to significant review and revision. The final draft was then reviewed by the Supreme Court and both houses in

59. The statement by Attorney General George Deukmejian concluded as follows: "There is absolutely no question that the passage of this proposition will result in more criminal convictions, more criminals being sentenced to state prison, and more protection for the law-abiding citizenry." CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION JUNE 8, 1982, at 34 (arguments in favor of Proposition 8). The argument against Proposition 8 stated that "Proposition 8 is so badly written it *mangles* nearly every aspect of the criminal justice system it touches." *Id.* at 35 (arguments against Proposition 8).

60. This concern lies at the heart of Chief Justice Bird's dissent in *Brosnahan v. Brown*, 32 Cal. 3d 236, 262, 651 P.2d 274, 290, 186 Cal. Rptr. 30, 46 (1982) (Bird, C.J., dissenting). The single-subject rule, she explained, was intended to dispel the dangers of voter confusion, inadequate notice and logrolling. *Id.* at 265-67, 651 P.2d at 291-93, 186 Cal. Rptr. at 47-49 (Bird, C.J., dissenting). Without reading it as demanding interdependency among ballot provisions, Bird argued, the single-subject rule was rendered meaningless. *Id.* at 273, 651 P.2d at 296, 186 Cal. Rptr. at 53 (Bird, C.J., dissenting).

Initiatives which embrace more than one subject *weaken* rather than strengthen a citizen's right to vote. They threaten to undermine the *integrity* and *strength* of the whole initiative process. If the voters are confused or misled, or if they vote for or against a proposal because they favor or oppose one or two of its provisions, the initiative process has not served to implement the will of the people.

Id. at 281, 651 P.2d at 301, 186 Cal. Rptr. at 57 (Bird, C.J., dissenting).

Congress, resulting in much debate and many revisions of particularly controversial sections.

There is no assurance that comparable consideration can be given in the initiative process. Voters, of course, are not experienced experts in the field of evidence. Political literature and news analyses do not detail the consequences of technical changes in the law. Moreover, evidence law changes are lost in the shuffle of bigger issues. Voters' attention may be even further diluted by the political stakes attached to initiatives like Propositions 8 and 115. Both were used by politicians running hard for governor of California on "tough on crime" platforms. Thus political preferences for one candidate or the other, having nothing to do with evidence law or even with the criminal justice system, may have determined how people voted. It is wrong to make changes in evidence law without giving them considered attention.

D. The Initiatives Distort Decision-Making About the Moral Claims of Evidence Law

There is special cause for concern about subjecting moral questions, like those posed by cutting back on the character and hearsay rules, to the initiative process. First, as argued above, these rules make important defining contributions to our justice system. The morality of a system of government does not derive solely from its outputs, but also from the substantive principles—here the equality of persons, government neutrality toward persons and individual accountability—that constrain its operations. Propositions 8 and 115 attacked the system's alleged outputs—delays, acquittals, insufficient punishment—and posed the moral choice as being between public safety and coddling criminals. Crime control goals are important and do raise moral choices in which the public should participate. But these choices do not effectively translate into the moral claims of the character and hearsay rules. It is wrong to allow the claims of these rules to get lost in the translation.

Second, moral deliberation requires just that: deliberation from a disinterested point of view about what is right. The appeal to public fear of violent crime made by the supporters of Propositions 8 and 115 distorted the public's point of view. It appealed to emotion.⁶¹ It put the

61. One criminal defense attorney . . . recalls spending an evening explaining the nuts and bolts of the measure [Proposition 115] and trying to get across to an audience the idea that, as a disincentive for defendants to plea bargain, the measure could produce more trials and add to costs.

The same night, a 30-second Proposition 115 spot starred a horribly scarred boy whose father . . . had just been paroled after serving less than eight years for having

question to its audience in highly charged, self-interested terms.⁶² It is wrong to change the moral basis of evidence principles through a decision-making process ill-suited to moral choices.

Finally, the moral values attached to respecting the personhood of criminal defendants and restraining the use of faceless accusers are fragile. The risks of bias against repeat offenders and of relying on hearsay declarants are familiar to lawyers, but may not be meaningful to lay persons, until perhaps they encounter a process infused with these risks in their own experience.⁶³ The point of moral deliberation is, then, to tap into the sources of conflicting values in an effort to resolve them, not to overwhelm them with fears and frustration.⁶⁴ These moral values are particularly susceptible to abuse in the political process. Politics dehumanizes individual defendants, subjects them to stereotyping, or turns them into the "crime problem." Yet the claims made by the character and hearsay rules relate to the defendant's humanity, and are at risk of being drowned out by instrumental arguments about "solving" the problem. Even the deliberative voter is trapped by the pairing of legitimate large anti-crime goals, and the large number of particular solutions proposed, with the fragile moral claims of the character and hearsay rules.

The judiciary and the legislature use procedures that better address the important moral questions involved in evidence law. The adversary system focuses the judge on the important questions. Its argument and counterargument methodology permits informed deliberation. The ethics of the judicial role demand that the judge adopt a disinterested point of view and give reasons for each ruling. Although they do not guaran-

set him afire. The defense attorney complained it was impossible for any explanation of the measure to compete with that.

Cox, *supra* note 40, at 38.

62. "Gann is quite open about building on public fears. 'The government is not protecting the people,' he says. It is 'turning vicious criminals loose every day.'" Press & Contreras, *supra* note 35, at 64. At a news conference for Proposition 115, Senator Pete Wilson was "[s]tanding before a semicircle of people who have been victims of violent crime or who have lost loved ones to murderers, [saying] California's criminal justice system is 'needlessly lenient' on alleged criminals." Catherine Gewertz, *Wilson Opens Drive for Crime Measure*, L.A. TIMES, February 6, 1990, at B2.

63. For example, some observers of the Senate Judiciary Committee Hearings on the nomination of Judge Clarence Thomas to the United States Supreme Court were disturbed by procedures they had not seen before, such as the lack of confrontation between Judge Thomas and Professor Anita Hill, Judge Thomas's refusal to submit to full cross-examination, and the use of "past acts" to impeach Professor Hill's credibility.

64. The prosecution of William Kennedy Smith for sexual battery has also put a spotlight on the character rule. The Florida trial judge refused to admit evidence concerning both the accuser's sexual history and specific incidents of the defendant's sexual conduct. The pros and cons of using such evidence to prove or disprove consensual sex can be fully debated only after analysis of the logical, empirical, procedural and moral issues involved.

tee it, these attributes of adjudication make possible considered judgments about what is right. And while the legislature is not always thought of as a repository of moral wisdom, its deliberative processes include inputs on moral questions far broader than common law adjudication. Legislators are familiar with both sides of the issues in evidence law. For example, the moral issues underlying Federal Rule of Evidence 609 on felony impeachment were debated in Congress along with the practical arguments pro and con.⁶⁵

There are ways to utilize the greater institutional competence of the judiciary and legislature while increasing the weight given to the interests of victims. The victims' rights initiatives in Florida and Arizona appear to keep the judicial branch in the role of mediating between the moral claims made on the criminal justice system by both victims and defendants.⁶⁶ This is congruent with moral deliberation and makes decision makers more responsive to a larger set of relevant values which are still within their judicial competence.

E. The Initiative Process Distorts Decision Making About the Balance of Burdens in Evidence Law

There is also special cause for concern about making evidence law changes through the initiative process that have an important effect on the balance of relative burdens between the prosecution and the defendant. The balance of burdens establishes the framework for the competitive relationship between the two sides of the adversarial criminal trial. Since the government is one side of this relationship, setting the balance raises a moral question of fairness and a legal question of due process. Deciding the moral question through the initiative process is subject to all of the concerns just stated above.

In addition, it is unfair for changes in this competitive relationship to be drafted exclusively by one side—the prosecution—and then im-

65. The debate between Senators McClellan and Hart, quoted in 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 314, at 300-12 (1979), posed the moral issue as a conflict between society's "right to know" and the potential victimization of the person with a prior criminal record.

66. The Florida amendment provided that victims' rights not interfere with the constitutional rights of the accused. *See supra* note 54. The Arizona amendment abjured the judiciary and legislature to have all rules of procedure and evidence "protect" victims' rights, thus promoting consideration of these values. *See supra* note 54. Generally framed propositions such as these can force courts "to strike a new balance between competing values." Joel L. Segal, *Proposition 8 and the California Supreme Court: Interpretation Run Riot?*, 60 S. CAL. L. REV. 539, 540 (1987). Segal asserts that Proposition 8 can promote "ongoing moral dialogue between the court, the legislature, and the voters, in order to make the best moral judgment" even though the "rhetoric behind [its] enactment may have been otherwise." *Id.*

posed on the other—the defendant—through a “winner take all” election. Both Propositions 8 and 115 were conceived, drafted and heavily supported by current and former prosecutors. The content of the Propositions was not mediated by compromise with competing interest groups. No formal process of argument and counterargument, of criticism and review, or of political compromise exists for privately drafted ballot initiatives.⁶⁷ The only formal constraint on the one-sidedness of content would be the drafters’ calculation of what it takes to win.⁶⁸

The competition for the vote on the Propositions was also unmediated by the natural factionalism that exists for most political questions. Within the general public, the criminal defendant has no natural constituency. Very few people are “pro-crime.” Groups with professional and personal commitments to constitutional rights and procedural justice did oppose both Propositions. But these are relatively abstract interests, not bread and butter issues that are likely to get a full hearing from the electorate.⁶⁹ Again, decisions about evidence issues that have a significant impact on a competitive relationship are ill-suited to a forum in which there is one-sided competition.

Prosecutors’ partisan sponsorship of the propositions also confuses the conception of their role. The prosecution represents the public and is charged with doing justice, not just winning. Prosecutors who do make arguments for evidence rules that will improve the competition at trial for the government’s side are supposed to do so only to promote the public good. And they are usually made where both sides are heard—through adjudication, where the defendant is personally represented, or through legislation, where many interest groups participate. A direct popular appeal by prosecutors where there is no mediating influence, and where the other side is underrepresented, undermines their role as disinterested representatives of the public good.

Finally, the “winner take all” nature of the initiatives destroys the possibility for compromise over the question of the proper balance of burdens. The voters do not choose between alternatives to current evi-

67. See *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (Bird, C.J., dissenting).

68. “The result of this inflexibility is that more often than not a proposed initiative represents the most extreme form of law which is considered practically expedient.” *Schmitz v. Younger*, 21 Cal. 3d 90, 99, 577 P.2d 652, 657, 145 Cal. Rptr. 517, 522 (1978) (Manuel, J., dissenting).

69. One commentator has written that “it is senseless to protect the value of fairness to defendants with conventional value judgments, when the reason we value such fairness is because conventional value judgments, do not always protect criminal defendants sufficiently.” Segal, *supra* note 65, at 581.

dence rules; none is presented where some might be possible.⁷⁰

This differs sharply from how both judges and legislators arrive at final decisions. Judge-made rules develop incrementally, on a case-by-case basis. They are subject to critique by the parties on appeal and by parties arguing the next case. They are subject to revision by other judges throughout the legal system. One-sidedness cannot dominate this process, and there is no "winner take all" solution to important fairness questions.⁷¹

Compromise and accommodation between competing interests are the hallmarks of the legislative process. The following description of the process resulting in an extensive victims' rights statute in Michigan illustrates this point:

[A] number of criminal justice professionals in Michigan were interested in the project and were ready to provide assistance. Information and guidance were provided by all players in the criminal justice arena, but the involvement of victims helped set the standard.

Several judges, prosecutors, and members of the defense bar provided generous amounts of time and expertise in the development of a draft bill. . . .

In June of 1984, a bill was formally introduced, but flaws quickly became apparent Rather than consign flawed legislation to a permanent pigeon hole, it was withdrawn. A five month 'back to the drawing board' intensive review and rewrite process followed. In January of 1985, it was reintroduced in a refined version as House Bill 4009.

While the language of House Bill 4009 was consistent with the concerns expressed by victims, several components were de-

70. For example, wholesale use of preventive detention (denial of bail) is not the only solution to genuine risks of victim harassment. *See, e.g.*, Henderson, *supra* note 28, at 970-86. And, wholesale admission of "law officer" hearsay is not the only solution to the problem of protecting victims who would suffer unduly from testifying at preliminary hearings. *See, e.g.*, Maryland v. Craig, 110 S. Ct. 3157, 3158 (1990) (testimony of child sexual abuse victim via one-way closed circuit television).

71. The famous description of the character rule by Justice Jackson in *Michelson v. United States*, 335 U.S. 469, 486 (1948) illustrates its quid pro quo nature:

[M]uch of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.

Id.

veloped only after extensive brainstorming or through practical experience.⁷²

Proposals put forward in privately drafted initiatives are not similarly tested by competing viewpoints. This is an important flaw when the proposal itself sets the framework for fairness in competition.

VII. CONCLUSION

It is perhaps too easy for evidence professors to criticize the changes in evidence law worked by Propositions 8 and 115. One immediate reaction might be that evidence rules ought to be left to the experts—judges, lawyers, academics and legislators. Another might be simply substantive disagreement with the moral choices and the balance of burdens that the Propositions enact. These responses illustrate the timeless dilemma of “popular” interference with the judgment of professional or elite groups that are specialists in their fields.⁷³

There are, however, grounds for criticizing the initiative process other than dismay over the transference of authority to make decisions or the substance of the outcomes themselves. The absence of careful attention, adequate information and deliberative choice sharply distinguish the initiative process from adjudication and legislation. Deference to professional competence, experience and accountability are just as much at stake as is deference to populist values. Further, the absence of deliberate reasoning about difficult moral claims, and the one-sided nature of proposals about a two-sided competition, are matters of genuine concern.

The initiative process is the subject of concern and criticism on other grounds as well.⁷⁴ Study of the empirical effects of Propositions 8 and 115, as measured against their crime control aims, is called for. The appropriateness of courts giving or denying them effect should also be

72. William Van Regenmorter, *Crime Victims' Rights—A Legislative Perspective*, 17 PEPP. L. REV. 59, 60 (1989).

73. Sometimes this dilemma assumes constitutional dimensions. California Proposition 24 restructured internal procedures of the California Legislature and raised a sharp conflict between popular and representational sovereignty, and was held in large part to violate the California Constitution. See James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 CAL. L. REV. 491, 493-94 (1986).

74. Traditional means of making constitutional changes are to be preferred over extratextual revision because “they foster societal consensus on basic values, promote constitutional stability, and limit majoritarianism.” Colantuono, *supra* note 52, at 1475. Direct democracy “is plagued by voter ignorance, voter apathy, and procedural defects, results in laws which impede minority rights, is inefficient, and has a deleterious effect on the branches of government.” Cynthia L. Fountaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 735, 737 (1988).

examined. The impetus to put the voting public in charge of crucial changes in evidence law is not likely to disappear, and it deserves our attention.